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# In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 328

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SECOND NATIONAL BANK OF SAGINAW, Saginaw, Michigan, Trustee of the Estate of Wellington R. Burt, Deceased,

Petitioner,

v.

THE UNITED STATES,

Respondent.

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On Writ of Certiorari to the Court of Claims

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## BRIEF FOR THE PETITIONER

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# INDEX


| | Page |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| STATEMENT OF THE CASE | 2 |
| STATUTES INVOLVED | 3 |
| QUESTIONS PRESENTED | 4 |
| SPECIFICATION OF ERRORS | 5 |
| SUMMARY OF ARGUMENT | 5 |
| INTRODUCTION | 6 |
| ARGUMENT | 8 |
| I. ON A PROPER CONSTRUCTION SECTION 611 MERELY LIMITS THE ADMINISTRATIVE POWER TO CREDIT OR REFUND AND DOES NOT PROHIBIT SUIT | 8 |
| II. THE WORD "STAYED" IN SECTION 611 IS NOT SYNONYMOUS WITH "DELAYED" BUT MEANS "LEGALLY DELAYED" | 19 |
| III. IF SECTION 611 IS CONSTRUED AS AN ATTEMPT TO BAR RECOVERY BY SUIT AS WELL AS REFUND AND CREDIT BY ADMINISTRATIVE ACTION, IT DOES NOT ATTEMPT TO LEGALIZE AND RATIFY THE COLLECTION OF THE TAX OR RATIFY OR LEGALIZE OR RECREATE THE TAX LIABILITY, BUT ONLY PURPORTS TO PROHIBIT RECOVERY OF AMOUNTS ILLEGALLY COLLECTED, AND AS THUS CONSTRUED THE SECTION IS CLEARLY UNCONSTITUTIONAL | 24 |
| (a) Further Construction of Section 611 if Construed to Bar Recovery by Suit | 25 |
| (b) Unconstitutionality of Section 611 Construed as Barring Recovery by Suit but not Legalizing or Ratifying Collection | 29 |
| (c) Section 611 does not Withdraw the Consent of the United States to be Sued if Right to Sue Collector Remains | 32 |
| IV. EVEN IF SECTION 611 BE INTERPRETED AS ATTEMPTING TO LEGALIZE AND RATIFY THE ACTION OF THE COLLECTOR IN COLLECTING THE TAXES AND/OR TO REIMPOSE OR LEGALIZE THE TAXES THUS COLLECTED, IT IS UNCONSTITUTIONAL | 32 |
| (a) Section 611 is Much too Unreasonably Retroactive to be Valid as an Imposition of Taxes de novo | 33 |

## INDEX (continued)


Page

(b) The Doctrine of the Heinszen and Rafferty Cases does not Sustain Section 611 ..... 35

(1) *The Doctrine of Ratification Established in the Heinszen Case is Inapplicable Unless Power to Authorize Existed When Collection was made* ..... 35

(2) *Section 611 is Invalid under the Doctrine of the Heinszen Case because the Attempted Ratification Followed Effective Repudiation* ..... 37

(3) *Congress must have had Power to Authorize at the Time of Ratification* ..... 38

(4) *The Limitations upon Curative Legislation in General Restrict the Power of Ratification* ..... 39

(c) Section 611, apart from its Retroactivity is Unreasonably Discriminatory, Arbitrary and Capricious and Therefore in Violation of the Fifth Amendment 43

CONCLUSION ..... 51

APPENDIX 1.

THE EXPIRATION OF THE STATUTORY PERIOD OF LIMITATION ON COLLECTION OF INTERNAL REVENUE TAXES NOT ONLY BARS THE REMEDY OF COLLECTION BUT ALSO EXTINGUISHES ALL LIABILITY FOR THE TAXES. EFFECT ON MAIN ARGUMENT OF CONTRARY HOLDING ..... 53

APPENDIX 2.

NOTE FROM DISSENTING OPINION, UNTERMYER V. ANDERSON, 276 U. S. 440 ..... 56


## CITATIONS


CASES Page

*Bird et al., Assignees of Carne & Telo v. Brown, et al.*, 4 Exch. 786 ..... 38

*Blodgett v. Holden*, 275 U. S. 142 ..... 33

*Bowers v. New York & Albany Lighterage Company*, 273 U. S. 346 ..... 8, 9

*Campbell v. Holt*, 115 U. S. 620 ..... 54, 55

*Cary v. Curtis*, 3 How. 236 ..... 29, 30

*Chapman, Adelaide F., v. United States*, 63 Ct. Cl. 424 ..... 11

*Cheatham v. United States*, 92 U. S. 85 ..... 30

*Coffey v. Exchange Bank*, 296 Fed. 807 ..... 13

*Collector v. Hubbard*, 12 Wall. 1 ..... 30

## CITATIONS (Continued)

CASES — Page


*Crooks, Noah, Collector, v. Benjamin Harrelson,* (Oct. Term 1930, No. 24, decided Nov. 24, 1930) — 19, 26

*Danforth v. Groton Water Co.,* 178 Mass. 472 — 40, 55

*Davis v. Mills,* 194 U. S. 450 — 53

*De Lima v. Bidwell,* 182 U. S. 1 — 26

*Dunbar v. Boston & P. R. Corporation,* 181 Mass. 383 — 41, 42

*Ellay Company v. Bowers,* 25 F. (2d) 637 — 10

*Elliott v. Swartwout,* 10 Pet. 137 — 31

*Florsheim Bros. Dry Goods Co. v. United States,* 280 U. S. 453, 466 — 18

*Forbes Pioneer Boat Line v. Commissioners,* 258 U. S. 338 — 38, 41

*Fox v. Edwards,* 297 Fed. 669 — 13

*Fullerton-Krueger Lumber Co. v. Northern Pacific Ry Co.,* 266 U. S. 435 — 22

*Gove v. Nichols,* 23 F. (2d) 856 — 11

*Graham v. DuPont,* 262 U. S. 234 — 30

*Graham & Foster v. Goodcell,* U. S. Sup. Ct., Oct. Term 1930, No. 36 — 5, 53

*Holden v. Metropolitan Bank,* 151 Mass. 112 — 37

*Lincoln v. United States,* 202 U. S. 484, 498 — 23, 26

*Linder v. United States,* 268 U. S. 5 — 16

*Marsh v. Fulton County,* 10 Wall. 676 — 38

*Mascot Oil Company v. United States,* 42 F. (2d) 309 — 19

*Missouri Pacific R. Co. v. Boone,* 270 U. S. 466 — 16

*Nichols v. Coolidge,* 274 U. S. 531 — 33

*Rafferty v. Smith, Bell & Company,* 257 U. S. 226 — 25, 26, 29, 31, 35

*Reeves v. Anderson,* 43 F. (2d) 679 — 16, 17, 47

*Russell v. United States,* 278 U. S. 181 — 3

## CITATIONS (Continued)

CASES


*Stange, Charles H., v. United States,*
U. S. Sup. Ct., Oct. Term 1930, No. 23 — 49
*Thornhill Wagon Company v. Noel,*
17 F. (2d) 407 — 10
*Toxaway Mills v. United States,*
61 Ct. Cl. 363; 273 U. S. 781; 63 Ct. Cl. 646 — 9, 11, 37, 38
*United States v. Burden, Smith & Co.,*
33 F. (2d) 229 — 23
*United States v. John Barth Co.,*
279 U. S. 370 — 19
*United States v. Heinszen,*
206 U. S. 370 — 25, 26, 29, 31, 35, 36, 37, 39, 40, 41
*United States v. Merriam,*
263 U. S. 179 — 26
*Untermyer v. Anderson,*
276 U. S. 440 — 33, 56
*Wickwire v. Reinecke,*
275 U. S. 101 — 30


STATUTES


*Revenue Act of* 1918, *Act of Feb.* 24, 1919, *c.* 18, 40 *Stat.* 1057
Section 250(b) — 48
Section 250(e) — 48
Section 252 — 12
Section 234(a) (14) — 20, 21, 22
*Revenue Act of* 1921, *Act of Nov.* 23, 1921, *c.* 136, 42 *Stat.* 227
Section 250(b) — 48
Section 250(d) — 3, 4, 34, 48, 54
Section 250(e) — 48
Section 252 — 12
Section 1320 — 34, 54
*Revenue Act of* 1924, *Act of June* 2, 1924, *c.* 234, 43 *Stat.* 253
Section 272 — 12
Section 281 — 12
*Revenue Act of* 1926, *Act of Feb.* 26, 1926, *c.* 27, 44 *Stat.* 9
Section 272 — 12
Section 279(f) (g) (h) — 20
Section 284 — 12, 13
Section 284(d) — 11, 15
Section 319(a) — 11, 15
Section 1106(a) — 3, 4, 10, 11, 12, 13, 14, 15, 16, 38
Section 1106(b) — 16
*Revenue Act of* 1928, *Act of May* 29, 1928, *c.* 852, 45 *Stat.* 791
Section 273(f) (g) (h) — 20
Section 322 — 12
Section 322(c) — 11, 15
Section 603 — 20
Section 606 — 15
Section 607 — 3, 4, 8, 10, 13, 14, 15, 17, 18, 25, 27, 45, 49

## CITATIONS (Continued)


STATUTES — Page

Section 609 — 45
Section 609(a) — 49
Section 611 — 3, 4, 5, 6, 8, 10, 13, 14, 15, 16, 18, 19, 21, 22, 23, 24, 25, 27, 28, 29, 32, 33, 34, 35, 36, 37, 39, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 54
Section 612 — 10
Section 710 — 18

*Corporation Excise Tax Act of* 1909 (*Act of Aug.* 5, 1909, c. 6, sec. 38, 36 *Stat.* 112) — 34

*Income Tax Act of* 1913 (*Act of Oct.* 3, 1913, 38 *Stat.* 114, 166, 172) — 34

*Revised Statutes*, Section 3220 — 9, 13

*Revised Statutes*, Section 3226 — 5, 9, 14, 17, 32

*Judicial Code*, Section 145 (28 U. S. C. sec. 250) — 5, 32

*U. S. C., Title* 26, *sec.* 149, *as amended by Act of Cong. May* 29, 1928, c. 901, *Sec.* 3, 45 *Stat.* 996 — 9

*U. S. C., Title* 26, *sec.* 156 — 9

*U. S. C., Title* 28, *sec.* 288 — 1

*Act of Cong. June* 30, 1906, c. 3912, 34 *Stat.* 636 — 25, 26

*Act of Cong. Feb.* 13, 1925, c. 229, *sec.* 3, 43 *Stat.* 939 — 1

*Act of Cong. May* 29, 1928, c. 901, *sec.* 3, 45 *Stat.* 996 — 9

MISCELLANEOUS

*Regulations* 45, *Article* 1032 — 44

*Regulations* 45, *Article* 1034 — 45

*Regulations* 45, *Article* 1035 — 45

*Regulations* 69, *Article* 1301 — 13

*Mimeograph* 3660, *VII-2 Cumulative Bulletin* 82 — 27, 46

*G. C. M.* 6296, *VII-2 Cumulative Bulletin* 152 — 45

*House Report No.* 1882, 70*th Cong.*, 1*st Session* — 28, 47

*House Report No.* 2, 70*th Cong.*, 1*st Session* — 47

*Cong. Record Vol.* 69, *p.* 10136 — 28

*Revenue Bill of* 1928 (*as introduced*), *H. R. No.* 1, 70*th Cong.*, 1*st Session* — 46

*Cooley, Constitutional Limitations* (7*th Ed.* 1903) *pp.* 528, 530, 543; (8*th Ed.* 1927) *pp.* 771, 773, 787 — 42

*Kent, Commentaries, Vol.* 2, *pp.* 415, 416 (*Vol.* 1, *star pages* 455, 456) — 41

*Holmes, Federal Income Taxes* (6*th Ed.* 1925) — 48

*Mechem, "Agency"* (2*d Ed.* 1914) *Sec.* 385 — 38

*Freund, "Responsibility of the State in England,"* 32 *Harv. L. Rev.* 447 — 31

*Amberg, "Retroactive Excise Taxation,"* 37 *Harv. L. Rev.* 691 — 33

*Harv. L. Rev., Vol.* 38, *p.* 526 — 22

# In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 323

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SECOND NATIONAL BANK OF SAGINAW, Saginaw, Michigan, Trustee of the Estate of Wellington R. Burt, Deceased,

Petitioner,

V.

THE UNITED STATES,

Respondent.

---

On Writ of Certiorari to the Court of Claims

---

## BRIEF FOR THE PETITIONER

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### OPINION BELOW

The opinion of the Court of Claims is reported in 40 F. (2d) 129.

### JURISDICTION

The judgment of the Court of Claims was entered April 30, 1930 (R. 14). Petition for writ of certiorari was filed July 29, 1930, and the writ was granted October 20, 1930 (51 Sup. Ct. 40). The jurisdiction of this Court rests on the Act of February 13, 1925 (43 Stat. at L. 939, Chap. 229, Sec. 3; 28 U. S. C. Sec. 288).

## STATEMENT OF THE CASE

The facts in this case were found by the Court of Claims and appear at pages 11 to 13 of the record.

These findings show that after the statute of limitations had run against the respondent's right to collect an income and profits tax from the Petitioner, the Collector (Commissioner) of Internal Revenue served a notice and demand on it to pay additional taxes in the amount of $27,531.16, together with interest in the sum of $4,198.50, totaling $31,729.66. The Petitioner, under protest, paid to the Collector of Internal Revenue the said sum of $31,729.66 on October 12, 1923.

The pertinent dates are as follows (R. 11-13):

Petitioner is a corporation and executor and trustee of the Estate of Wellington R. Burt, who died March 2, 1919.

April 1, 1918, Burt's return for 1917 was filed.

January, 1921, additional assessment made.

February 17, 1921, claim in abatement filed.

November 23, 1922, part payment made by credit of overpayment of taxes for 1920.

April 1, 1923, expiration of five-year period for collection of tax.

May 24, 1923, claim in abatement rejected.

October 2, 1923, notice and demand for payment of tax made.

October 12, 1923, tax paid by Petitioner under protest.

July 11, 1927, claim for refund filed.

September 1, 1928, claim for refund rejected.

February 4, 1929, suit commenced (R. 6).

Court of Claims entered judgment for the respondent on April 30, 1930, in opinion reported in 40 F. (2d) 129, holding that Section 611 of the Revenue Act of 1928 barred recovery in this case.

From the above it appears that on April 1, 1923, the right of the respondent to collect any additional tax for 1917 from the Petitioner became barred by the statute of limitations under the decisions of this Court in *Bowers v. New York & Albany Lighterage Company*, 273 U. S. 346 (Feb. 21, 1927), and *Russell v. United States*, 278 U. S. 181 (Jan. 2, 1929).

In connection with the claim in abatement filed by Petitioner on February 17, 1921, the Court of Claims found (R. 13):

> "Upon receipt of a claim in abatement it was the common practice to hold up the collection of an additional assessment. The Collector of Internal Revenue *acted in accordance with this practice and in the exercise of his discretion* actually held up the collection of the additional assessment and forwarded the said claim to the Commissioner of Internal Revenue in due course. The collector made no further endeavor to collect the amount covered by the claim in abatement in this case until after the claim had been finally adjusted by the Commissioner of Internal Revenue." (Italics ours).

The respondent relies in defense upon Sections 611 and 607 of the Revenue Act of 1928.

## STATUTES INVOLVED

The statutes involved are Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266), and Sections 607 and 611 of the Revenue Act of 1928, which were enacted May 29, 1928 (45 Stat. 791, 874, 875); and we refer at length also to Section 1106(a) of the Revenue Act of 1926 (44 Stat. 9, 113). The material portions of these statutes follow:

Revenue Act of 1921:

> "Sec. 250(d). The amount of income, excess profits, or war profits taxes due under any return made under . . . prior income, excess profits, or war profits tax acts . . . shall be determined and assessed within five years after the return was filed . . . and no suit or proceeding for the

collection of any such taxes due under this Act or under prior income, excess profits, or war profits tax acts . . . shall be begun, after the expiration of five years after the date when such return was filed . . ."

Revenue Act of 1928:

"Sec. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Revenue Act of 1926:

"Sec. 1106(a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. . . ."

## QUESTIONS PRESENTED

The questions presented are whether Sections 611 and 607 of the Revenue Act of 1928 attempt to prevent the recovery by suit of taxes paid at the times and under the circumstances above set forth, and whether if so construed

they do not violate the Fifth Amendment to the Federal Constitution.

## SPECIFICATION OF ERRORS

1. The court below erred in not construing Section 611 as barring administrative credits and refunds only and as having nothing to do with suits in court.

2. The court below erred in not holding that, if Section 611 is construed as barring all recovery by suit as well as by administrative credit or refund, it is in violation of the Fifth Amendment.

3. The court below erred in holding that Section 611 applies to a case where there has been merely a *delay* in collection and not a legal *stay* of collection.

4. The court below erred in not holding that Section 611 has no application to the present case because it does not appear that collection was even delayed *by* the claim in abatement.

5. If the decision of the court below is to be construed as holding that Section 611 is a withdrawal by the United States of consent to be sued previously conferred by Section 145 of the Judicial Code, and Section 3226 of the Revised Statutes, it is in error in this regard.

6. The court below erred in holding that Section 611 applies to payments under protest and not simply to voluntary payments. (This matter is sufficiently covered in the brief for Petitioners in *Graham v. Goodcell*, No. 36, and will not be discussed in this brief).

7. The court below erred in dismissing the petition.

## SUMMARY OF ARGUMENT

The Argument of the Petitioner in this case will be developed under four main propositions, the sustaining of either one of which will be sufficient to establish Petition-

er's right to recover. The propositions are entirely independent of each other, and the failure of the Petitioner to sustain either one of the propositions will in no way affect Petitioner's position in connection with either of the other propositions.

I. ON A PROPER CONSTRUCTION SECTION 611 MERELY LIMITS THE ADMINISTRATIVE POWER TO CREDIT OR REFUND AND DOES NOT PROHIBIT SUIT.

II. THE WORD "STAYED" IN SECTION 611 IS NOT SYNONYMOUS WITH "DELAYED" BUT MEANS "LEGALLY DELAYED."

III. IF SECTION 611 IS CONSTRUED AS AN ATTEMPT TO BAR RECOVERY BY SUIT AS WELL AS REFUND AND CREDIT BY ADMINISTRATIVE ACTION, IT DOES NOT ATTEMPT TO LEGALIZE AND RATIFY THE COLLECTION OF THE TAX OR RATIFY OR LEGALIZE OR RECREATE THE TAX LIABILITY, BUT ONLY PURPORTS TO PROHIBIT RECOVERY OF AMOUNTS ILLEGALLY COLLECTED, AND AS THUS CONSTRUED THE SECTION IS CLEARLY UNCONSTITUTIONAL.

IV. EVEN IF SECTION 611 BE INTERPRETED AS ATTEMPTING TO LEGALIZE AND RATIFY THE ACTION OF THE COLLECTOR IN COLLECTING THE TAXES AND/OR TO REIMPOSE OR LEGALIZE THE TAXES THUS COLLECTED, IT IS CLEARLY UNCONSTITUTIONAL.

## INTRODUCTION

The construction of Section 611 should not be approached without a thorough appreciation of the very radical provisions which it contains, if construed as the Government contends it should be. The legislation will be discussed from this standpoint under the Headings III and IV of the

Argument, in which the unconstitutionality of the section as thus construed is urged.

However, entirely aside from unconstitutionality, it must not be lightly presumed that Congress has intended to destroy all right of action for taxes collected after all liability for same had gone, or after the bar of the statute of limitations had fallen, unless it appears in clear and unmistakable terms that it has done so. This is especially true when the facts in a case like the present are considered. The tax was imposed for the year 1917. The statute of limitations expired on April 1, 1923, five years after the filing of the return. The tax was collected more than six months later, and a full and complete right of action to recover it then vested in the taxpayer. The Revenue Act of 1928 was not passed until May 29, 1928, and during all of the time from October 12, 1923, to May 29, 1928, a full and complete right of action existed in the plaintiff to recover the amount sought to be recovered in this suit.

In order for the Court to hold that Congress had any such intention, it is respectfully submitted that that intention must appear in clear words from which there can be no escape, and that no committee reports to show the intention which some of the parties proposing this act may have had in mind can be considered for the purpose of giving to the words used a meaning broader than they would normally have when considered in connection with similar words used elsewhere in the Revenue Acts. In connection with the contention that little weight is to be given to the committee reports (if they are considered at all), if they go in the least beyond the clear words used in the Act, it should be borne in mind that there was a severe conflict in Congress in connection with this section, and that it was inserted against the wishes of the Senate, and only by way of compromise, after radical amendment, and that the members of the House of Representatives, in framing the section, probably phrased it as strongly as they felt they could phrase it and not have it rejected.

In connection with the constitutional arguments under the Headings III and IV of our Argument it is urged that the Court keep before it the argument developed in the Appendix 1 to this brief in support of the contention that the expiration of a statute of limitations on collection of internal revenue taxes not only bars the remedy but extinguishes the liability. This argument has already been developed at length in other briefs filed in companion cases, and we are confident that this Court will recognize its strength. The question of the effect on the constitutional arguments of the possible rejection of the argument on the extinguishment of liability is also discussed in Appendix 1, toward the end.

## ARGUMENT

### I.

### ON A PROPER CONSTRUCTION SECTION 611 MERELY LIMITS THE ADMINISTRATIVE POWER TO CREDIT OR REFUND AND DOES NOT PROHIBIT SUIT

Section 607 provides that a payment after the expiration of the statute of limitations "shall be considered an overpayment and shall be credited or refunded to the taxpayer." Section 611 provides that under certain circumstances a payment after the expiration of the statute of limitations "shall not be considered an overpayment under the provisions of Section 607" and we may assume for the present that Section 611 provides impliedly, as the Government contends, that such payments "shall not be credited or refunded."

It is necessary therefore to find the meaning of "credit and refund" in the Revenue Acts and also the meaning of "overpayment," and to find what is the effect of a prohibition of "credit or refund." The interpretation of Section 611 will then be obvious.

When the tax in this case was collected over the protest of the Petitioner, the statute of limitations had expired and a right immediately vested in the Petitioner to bring suit against the collector or the United States, as it might choose, and to recover the taxes thus wrongfully collected.

*Bowers, v. New York & Albany Lighterage Company*, 273 U. S. 346 (Feb. 21, 1927);

*Toxaway Mills v. United States*, 61 Ct. Cl. 363 (Dec. 7, 1925). Reversed by the United States Supreme Court on confession of error by the Solicitor General. 273 U. S. 781 (March 14, 1927). Final judgment rendered 63 Ct. Cl. 646 (June 6, 1927).

This right was recognized and circumscribed by Section 3226 of the Revised Statutes which has been reenacted and amended in the various Revenue Acts. That section provides:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been *erroneously or illegally assessed or collected*, or of any penalty claimed to have been *collected without authority* or of any sum alleged to have been *excessive* or in *any manner wrongfully collected* until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue. . . ." (Italics ours). (26 U. S. C. Sec. 156).

Section 3220 of the Revised Statutes was also amended by the various Revenue Acts. That section provides:

"Sec. 3220. The Commissioner of Internal Revenue, . . . is authorized to remit, refund, and pay back all *taxes erroneously or illegally assessed or collected*, all *penalties collected without authority*, and all *taxes* that appear to be *unjustly assessed* or *excessive in amount*, or *in any manner wrongfully collected*. . . ." (Italics ours). (26 U. S. C. Sec. 149, as amended by Act of Congress May 29, 1928, Ch. 901, Sec. 3, 45 Stat. 996).

It will be noted that Section 3226 does not speak of suits for the "refund or credit" of taxes, but speaks only of suit "for the recovery of any internal-revenue tax."

It will also be noted that neither of these sections confines itself to overpayment, and in fact the word "overpayment" is not mentioned in either of the sections. It is true that "taxes excessive in amount" are referred to, but this is only one of the different grounds upon which taxes may be recovered under these sections which refer first of all to "taxes erroneously or illegally assessed or collected."

Then on February 27, 1926, Congress enacted the Revenue Act of 1926, Section 1106(a) of which provided in part:

> "Sec. 1106(a). The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability; *but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. . . .*" (Italics ours),

That section contains every word which it is necessary to construe in interpreting Sections 607 and 611. It contains the words "credit or refund" which it prohibits under certain circumstances. It also contains the word "overpayment" ("overpaid the tax"). This section was repealed by Section 612 of the Revenue Act of 1928 and was replaced by Sections 607 to 611, inclusive, of the Revenue Act of 1928. These sections are therefore, in a peculiar sense, in *pari materia*, and the interpretation of Sections 607 and 611 of the Revenue Act of 1928 is simplified by a comparison with Section 1106(a) of the Revenue Act of 1926 and the construction which that section had received prior to the enactment of Sections 607 and 611.

The express prohibition of Section 1106(a) against "credit or refund" where there had not been an actual "overpayment," had been interpreted by the courts as not barring recovery by suit on the basis of the statute of limitations alone in the following cases:

> *Thornhill Wagon Company v. Noel*, 17 F. (2d) 407 E. D. Va. 1926);
>
> *Ellay Company v. Bowers*, 25 F. (2d) 637 (C. C. A. 2d, April 9, 1928) (cer. den. 277 U. S. 606);

*Gove v. Nichols*, 23 F. (2d) 856 (D. Mass., Jan. 19, 1928).

The only court which had held to the contrary and considered 1106(a) as a bar to recovery by suit was the Court of Claims in the case of *Adelaide F. Chapman v. United States*, 63 Ct. Cl. 424 (Feb. 14, 1927), which court seems to have continued to labor under the same erroneous impression as to the law which accounts for its decision in the case of *Toxaway Mills v. United States*, supra, later reversed on confession of error in this Court. On petition by the taxpayer to this Court for certiorari in the *Chapman* case the Solicitor General joined with the taxpayer in opposing this construction of Section 1106(a). The only reasonable interpretation of the section seems to be that it prohibited administrative refund of collections made after the statute, but that it had no effect whatever upon suit.

The words "credit or refund" generally are confined in their meaning in the Revenue Acts to credits and refunds by administrative action, and have not been used to refer to recovery by suit. It is certainly true that in general the word "credit" contemplates and refers to administrative action.

It will be noted that when Congress has intended to prohibit recovery by suit it has not confined itself to a prohibition of "credit or refund," but has expressly prohibited "recovery by suit." For example, in Section 284(d) of the Revenue Act of 1926 (44 Stat. 9, 67), Congress provided that where the taxpayer had been given the right to appeal to the Board of Tax Appeals and had filed an appeal within the time prescribed:

> ". . . No *credit or refund* . . . shall be allowed or made and *no suit* . . . for the recovery of any part of such tax shall be instituted in any court . . ." (Italics ours).

Similar language appears in Section 319(a) of the Revenue Act of 1926 and Section 322(c) of the Revenue Act of 1928.

We have observed above that the Revised Statutes dealing with suit and claims for refund, which afford the basis of suit, have referred to "excessive" payments (the only words in those sections approaching "overpayments"), but have referred to "excessive" payments as only one of the classes of payments which may be recovered by suit. Section 1106(a) seems to show conclusively that "overpayment" is not synonymous with "taxes erroneously or illegally assessed or collected," and that there are erroneous and illegal assessments and collections which do not come within the meaning of overpayment as understood by Congress in the Revenue Acts. Section 1106(a) provides:

> "But no credit or refund in respect of such tax shall be allowed *unless* the taxpayer has *overpaid the tax.*"

If the word *"overpayment"* were synonymous with *"taxes erroneously or illegally assessed or collected,"* the portion of Section 1106(a) just quoted would be entirely useless and meaningless, because any payment after the statute would upon that assumption necessarily constitute an "overpayment." The word "overpayment" seems to refer, in Section 1106(a) at least, to payments in excess of the amounts due upon a proper computation, regardless of any legal bar to collection. *It is certainly not synonymous with taxes "illegally or erroneously assessed or collected."*

While the latter words are generally used in the Revised Statutes with reference to recovery of taxes by suit, the word *"overpayment"* has been generally employed in the administrative sections contained in the body of the Revenue Acts beginning with the Revenue Act of 1924. The sections providing for *"credit and refund"* and using the word *"overpayment"* are Sections 272 and 281 of the Revenue Act of 1924, Sections 272 and 284 of the Revenue Act of 1926, and Section 322 of the Revenue Act of 1928; and the words *"tax . . . paid in excess of that properly due"* are used in similar sections in the earlier acts, Section 252 of the Revenue Act of 1921 and Section 252 of the Revenue Act of 1918.

That these sections of the statutes, in which the words "credit and refund" and the word "overpayment" are used, relate only to the authority of the Commissioner and have no effect upon the right of the taxpayer to sue the Collector is borne out by the case of *Fox v. Edwards*, 287 Fed. 669 (C. C. A. 2d, 1923). See also *Coffey v. Exchange Bank*, 296 Fed. 807 (C. C. A. 8th, 1924).

The distinction is clearly set forth in Article 1301 of Regulations 69 under the Revenue Act of 1926:

> "Authority for the credit and refund of any overpayment of any income . . . tax . . . is contained in Section 284. General authority for the remitting or refunding of taxes erroneously or illegally assessed or collected is found in Section 3220 of the Revised Statutes . . ."

After thus noting the interpretation of similar language used in the earlier statutes, and in the very section which is replaced by Section 607 and the following sections of the Revenue Act of 1928, a consideration of Section 607 and Section 611 makes it clear that the language used is not broad enough to bar recovery by suit, although a claim in abatement had been filed, and assuming the collection of the tax was stayed thereby.

Section 607 of the Revenue Act of 1928 provides:

> "Any tax . . . assessed or paid . . . after the expiration of the period of limitation . . . *shall be considered an overpayment and shall be credited or refunded* to the taxpayer . . . " (Italics ours).

The use of the words *"shall be credited or refunded"* and *"overpayment"* indicates very clearly that Section 607 is purely an administrative section and has nothing whatever to do with suits in court which could have been maintained as well before as after the passage of Section 607. The language used clearly shows that Section 607 was directed to administrative action and was aimed to provide for what 1106(a) of the Revenue Act of 1926 had been construed to forbid, that is administrative credit or refund.

The use in Section 607 of the words *"shall be considered* an overpayment" is significant. The fact that it is stated that any such payment shall be *"considered"* an "overpayment" makes it apparent that Congress recognized that it was not previously an "overpayment" and now wished to make it so. If Section 1106(a) had not prohibited administrative refunds of taxes untimely collected "unless the taxpayer has *overpaid* the tax," it is most unlikely that Section 607 would have contained any provision whatever with reference to overpayments. The section would probably have provided only that the tax "shall be credited or refunded to the taxpayer." In other words, the declaration that such a payment shall be considered an overpayment seems to be only an incidental part of the plan of making such payment subject to administrative refund. 1106(a) had provided it should not be so subject unless overpaid. Section 607 therefore provided it should be *"considered* an overpayment."

As stated above, Section 611 is merely a limitation upon Section 607. Section 611 simply provided that payments made under certain conditions where claim in abatement had been filed "shall not be considered an overpayment under the provisions of Section 607." Certain payments constituting taxes erroneously or illegally assessed or collected or otherwise wrongfully assessed or collected, not previously constituting overpayments, were made overpayments by the provisions of Section 607. Section 611 in effect says that the provisions of Section 607 making overpayments of certain payments not previously overpayments shall not apply to the payments described in Section 611. This certainly cannot be construed to make payments which previously beyond question were *"taxes erroneously or illegally assessed or collected"* or otherwise *"wrongfully collected,"* and therefore recoverable under Section 3226 of the Revised Statutes, into valid and legal payments, and therefore not recoverable.

As stated above, it may be assumed for the purpose of this argument that Section 611 may be construed, as the Government contends, as prohibiting whatever Section 607 allows, and therefore in effect providing that "no credit or refund of any tax covered by Section 611 shall be made to the taxpayer." But with Congress knowing as it clearly did from the consideration of Section 1106(a) without reference to the various other provisions of the Revenue Acts (which tend to confirm the construction arrived at from a consideration of 1106(a) alone), that "credit or refund" was used in the Revenue Acts to relate to administrative action, and that "overpayment" is not synonymous with "taxes erroneously or illegally assessed or collected," it is not to be presumed that if Congress had intended to forbid the recovery by suit of taxes which had admittedly been "erroneously or illegally assessed or collected," it would have contented itself with providing that such taxes should not be "considered an overpayment," much less by providing that they should not be "considered an overpayment under the provisions of" a particular section which conferred no new right to recovery by suit, and in fact made no reference to suit whatever, expressly or impliedly.

In this connection attention is called again to the care which has been taken by Congress to prohibit suit for recovery in court in precise terms as well as to prohibit credits and refunds when it intended to prohibit court action. As illustrative of this, we referred above to Section 284(d) and 319(a) of the Revenue Act of 1926, and Section 322(c) of the Revenue Act of 1928.

It should also be observed that in Section 606 of the Revenue Act of 1928, the section immediately preceding Section 607, Congress has in express terms prohibited court action where it has been its purpose to do so. It provides:

> "Sec. 606(b) . . . (1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and (2) in any suit, action or proceeding, such agreement,

or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded."

The provisions of Section 1106(b) of the Revenue Act of 1926 are substantially the same. Those provisions appear in another subsection of the same section in which appear the provisions of Section 1106(a), discussed above.

The construction for which we have contended above, and which we submit to be the reasonable construction of this statute, would be sound even if the statute did not relate to taxes, and if it were not retroactive. The fact that it does relate to taxes requires it to be liberally construed in favor of the taxpayer and against the Government. This is especially true when it is considered that the statute is retroactive. If Section 611 is construed to bar all recovery by suit, as well as by administrative refund, as the Government contends it should be, it is very clearly unconstitutional. To say the least, the gravest doubts as to its constitutionality would be raised, and it is clear from the decisions of this Court that where a construction will make the constitutionality of a statute even doubtful, and another reasonable construction can be given it, it will be so construed as to avoid the constitutional doubt.

*Missouri Pacific R. Co. v. Boone*, 270 U. S. 466 (1926);

*Linder v. United States*, 268 U. S. 5 (1925).

Waiving for a moment the question of constitutionality, we respectfully submit that the result of construing the statute as the Government contends it should be construed, is so shocking to one's sense of fairness that any plausible construction of the Act which would avoid these results should be adopted.

FALLACY OF ARGUMENTS IN OPINION IN REEVES V. ANDERSON AGAINST CONSTRUCTION FOR WHICH WE CONTEND. We feel that the argument in this brief answers the argu-

ments of Judge Hand in the case of *Reeves v. Anderson*, 43 F. (2d) 679 (C. C. A. 2d, July 21, 1930), but two of his arguments we specifically mention. He states that the construction which we here urge limiting Section 607 to administrative refunds is unreasonable because:

(1) Section 3226 of the Revised Statutes requires the filing of a claim for refund as a condition precedent to suit, and it would be an unusual thing to require as a condition precedent to suit the filing of a claim, the granting of which is prohibited;

(2) It is difficult to conjure any reason which Congress could have had for obliterating the more commodious way of settling such controversies (i. e. by administrative refunds), and still exposing the treasury to actions at law which would result in exactly the same thing.

There are any number of answers to the first argument. The first one which would occur to anyone is that Congress simply overlooked the amendment of a general section such as 3226 to fit a particular case such as this. On the other hand, there would be a very good reason for not amending that section so as to eliminate the necessity for a claim for refund. The matter of the time limit on suits for refund may be extended for a number of years by the filing and pendency of a claim for refund. The filing of the claim puts the Government on notice that suit may be contemplated and tends to preserve whatever evidence is necessary. It would have been unreasonable to extend the time for the filing of a claim for refund and force the taxpayer to sue much earlier than he might otherwise have to sue, and it would also be unreasonable to extend the time for filing suit for nearly as long as it might be extended by a claim for refund. The drawing of amendatory provisions would have involved considerable difficulty and would undoubtedly have done more harm than good. The filing of a claim for refund, although the Commissioner may be forced by law

to reject it in the particular case, causes no real trouble to anyone.

One is reminded of the answer given by Mr. Justice Brandeis to an argument which was made by counsel in the case of *Florsheim Bros. Dry Goods Co. v. United States*, 280 U. S. 453, 466 (1930):

> "It is also urged that unless a contract was intended (in the execution of a waiver), there is no reason why the consent of the Commissioner should have been required. But an otherwise plain meaning should not be distorted merely for the sake of finding a purpose for this administrative requirement."

The second argument is sufficiently answered by calling attention to the great jealousy which has been shown in Congress in connection with refunds by the Commissioner. In this connection, attention is called to the provisions of Section 710 of the Revenue Act of 1928, which provides that no refund or credit in excess of $75,000.00 shall be made until a report of it has been filed for thirty days with a joint committee on internal revenue taxation. This provision has never been construed by the committee to relate to payments made pursuant to court judgments and the Department and the Comptroller General have construed it as not applying to such payments.

Indeed, there is agitation at present for a Congressional investigation to establish rules for court adjudication of tax refunds generally. V. U. S. Daily 2654:1, October 30, 1930. Representative Garner of Texas, minority leader of the House and ranking member of the Ways and Means Committee, urges such action, as reported in the periodical cited. At least it is not inconceivable to have legislation prohibiting administrative refunds in cases where judgment may be had in court.

There was perhaps a sounder reason, however, in the present case for taking the situations covered by Section 611 out of the provisions of Section 607 directing admin-

istrative refunds. Many claims in abatement were filed with bond as was that involved in the case of *United States v. John Barth Co.*, 279 U. S. 370 (1929), and in many others money had been deposited in escrow as in the case of *Mascot Oil Company v. United States*, 42 F. (2d) 309 (Ct. Cl. 1930), now pending in this Court on certiorari. There were many legal questions with reference to the effect of claims in abatement and the other facts accompanying claims in abatement, which were not clear, and it was perfectly reasonable for Congress to leave these matters to be determined by the courts and to remove them beyond the administrative power of the Commissioner. The questions involved being purely legal, the trial of such cases in court involves no such accounting difficulty as is involved in the determination of the amount of tax due on the merits.

But the clearest answer to all such arguments is made by Mr. Justice Sutherland in the case of *Noah Crooks, Collector, v. Benjamin Harrelson* (October Term 1930, No. 24), decided by this Court on November 24, 1930, where he reiterates the principle thoroughly established by the decisions of this Court, that when Congress has used plain terms, the literal meaning of which is clear, the Court is not to modify that meaning, even to avoid what may seem to the Court unreasonable results; and that this adherence to the letter of the statute applies with peculiar strictness to taxing acts.

## II.

## THE WORD "STAYED" IN SECTION 611 IS NOT SYNONYMOUS WITH "DELAYED" BUT MEANS "LEGALLY DELAYED"

One of the conditions necessary to the operation of Section 611 is that the collection of the tax must have been *"stayed"* by the filing of the claim in abatement. The Government contends that *"stayed"* in this connection means merely *"delayed."* We maintain that it means *"legally forbidden"* or *"legally prohibited."*

"Stayed" may be synonymous with "delayed" in many situations; but when it is used in the sense of affecting the action of an officer of the Government in the performance of the duties of his office, it means "legally delayed." This construction is clear without any reference to committee reports or other legislative history. And this is especially true when the rule of liberal construction in favor of the taxpayer is considered. We are also confirmed in this construction by the use of the word "stay" in other sections of the Revenue Acts (Sections 273(f) (g) and (h) of the Revenue Act of 1928 and 279(f) (g) and (h) of the Revenue Act of 1926 and 603 of the Revenue Act of 1928), where it clearly refers to a "legal stay."

It is admittedly true that a claim in abatement did not generally work any "legal delay" of collection. But there was one class of cases where it did effect a "legal delay." That is in the cases covered by Section 234(a) (14) of the Revenue Act of 1918, which provides as follows:

> "Sec. 234(a) (14). At the time of filing return for the taxable year 1918, a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss (whether or not actually realized by sale or other disposition) resulting from any material reduction (not due to temporary fluctuation) of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. *In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided,* but *the taxpayer shall accompany his claim with a bond* in double the amount of the tax covered by the claim, *with sureties satisfactory to the Commissioner,* conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed, then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed . . . " (Italics ours).

The interpretation of the word "stay" as meaning "legal delay" does not therefore make it meaningless.

The Government then replies that Section 611 covers cases where the claim in abatement is filed *"with or without bond,"* and contends that there could be no "legal stay" under Section 234(a) (14) where no bond was given, and that therefore the words *"without bond"* would be meaningless if "stay" is interpreted as *"legal delay."* This argument places a construction upon 234(a) (14) which the language of the section does not necessarily require. It is no doubt contemplated by that section that a bond will generally be filed where a stay is sought. But the provision with reference to a bond is so placed and so worded that it could certainly be argued with great reason that it is not mandatory but directory, and that the Commissioner may waive the requirement if he sees fit to do so. If he did waive the requirement, either by accepting a deposit of cash or because for some other reason he was confident of being able to collect without a bond and notified the taxpayer that he was waiving that requirement, it could be argued with great force that the collection of the tax would be stayed just as if a bond had been given. It would certainly have been reasonable for Congress to have recognized such a possibility in providing for cases where "legal delay" of collection was effected by claim in abatement.

Even if there is no case where there could have been a "legal stay" without a bond, the word "stay" should not for that reason alone be construed to mean a mere "voluntary delay." The rule which requires that every part of an Act should be given some reasonable meaning should not prevail over the rule that words are to be taken in their usual and ordinary sense in the connection in which they are employed and in the same sense in which they are used elsewhere in the same Act. A different rule might apply if the provisions of Section 611, if construed to refer only to a legal stay, were in direct conflict with other provisions of

the Revenue Acts. This, however, is not the situation. Section 611 is made to apply only where (1) claim in abatement is filed with or without bond, and also (2) collection is stayed. The fact (if it be a fact), that there can be no "stay" without a bond does not make any provision of Section 611 conflict with any other. At most it simply shows that Congress may have been laboring under a misapprehension as to the effect of filing a claim in abatement without bond.

The fact that a limitation of this section to the cases where collection was "legally delayed" may cause the section to operate less broadly than Congress may have anticipated does not warrant placing upon the words used other than their ordinary meaning. It was strikingly held by this Court in the case of *Fullerton-Krueger Lumber Co. v. Northern Pacific Ry. Co.*, 266 U. S. 435 (1925), that the fact that the "evil" to be remedied is clearly very much broader than the language of the remedial Act does not authorize the court to construe that Act retroactively when the intention that it should be retroactive is not clearly expressed. See 38 *Harv. L. Rev.* 836.

The court should not construe "stay" here as meaning mere "delay" where the intention is not clearly expressed. It is not nearly so unreasonable to provide that a "legal delay" should take a case out of the operation of the statute of limitations as it is to provide that mere "voluntary delay" should do so. It is probable that the "stay" provided for by Section 234(a) (14) of the Revenue Act of 1918 would have automatically suspended the running of the statute of limitations. Certainly in a situation of that kind the provisions of Section 611, especially if construed to bar all recovery, would be much more reasonable than in cases where there has been mere voluntary forbearance by collectors in their own discretion.

In that connection it should be borne in mind that Congress is made up largely of lawyers. *It is not at all certain*

*that Section* 611 *could have been enacted at all if it had used the word "delayed" instead of "stayed."* A lawyer would naturally understand the fairness of some such provision as this where collection had been "stayed" or "legally delayed" while he would not be inclined to agree to any such provision based upon mere voluntary delay in collecting. It should be borne in mind that the Senate was hostile to the section even in the form in which it was passed, and that it went in under a compromise arranged with the House of Representatives. In this connection the language of the court in *Lincoln v. United States*, 202 U. S. 484, 498 (1906), is most appropriate.

> "It should also be remembered that there was a powerful opposition in Congress and that the phraseology of the act probably represents all that it was deemed safe to ask. Every consideration requires that the ambiguous language of the act should not be stretched beyond the exact and literal meaning of the words."

Lastly, it is submitted that *there should not be lightly attributed to Congress an intention to make the matter of reopening the statute of limitations in connection with taxes long barred dependent upon the oral testimony of collectors* as to whether a voluntary and discretionary indulgence was brought about by a claim in abatement or by some other of the reasons which may have caused delay in various cases, such as inability to find property of the taxpayer, the voluntary withholding by the collector, regardless of the filing of the claim in abatement, to avoid financial embarrassment in cases where it was felt that the collection of the tax was not being endangered, etc.

The Circuit Court of Appeals for the Fifth Circuit, in the case of *United States v. Burden, Smith & Co.*, 33 F. (2d) 229 (1929), has reached the correct result on this question and the opinion, though brief, is sound. The court there said:

> "Taxing statutes are to be interpreted liberally in favor of the taxpayer. Words of the statute are to be given their

plain meaning. 'Stayed,' in a legal sense, is not interchangeable with 'delayed.' It connotes some act on the part of the taxpayer which would morally or legally tie the hands of the Commissioner and prevent collection of the tax. The mere filing of a claim for abatement without more could not possibly have that effect."

## III.

## IF SECTION 611 IS CONSTRUED AS AN ATTEMPT TO BAR RECOVERY BY SUIT AS WELL AS REFUND AND CREDIT BY ADMINISTRATIVE ACTION, IT DOES NOT ATTEMPT TO LEGALIZE AND RATIFY THE COLLECTION OF THE TAX OR RATIFY OR LEGALIZE OR RECREATE THE TAX LIABILITY, BUT ONLY PURPORTS TO PROHIBIT RECOVERY OF AMOUNTS ILLEGALLY COLLECTED, AND AS THUS CONSTRUED THE SECTION IS CLEARLY UNCONSTITUTIONAL

Assuming that the court disagrees with the contention under Headings I and II of our Argument, holding that "stay" is synonymous with "delay," and holding that Section 611 attempts to bar recovery by suit as well as by administrative refund, we contend that the section is unconstitutional.

We contend under Heading IV of our Argument, pages 32 to 50, that even if Section 611 is construed to reimpose or to ratify and legalize the barred tax and/or the act of the collector in collecting same, it is unconstitutional.

Under this Heading (III) we maintain that it is plain that the section does not attempt to reimpose an extinguished liability and/or to legalize or ratify the action of the collector in collecting same, but that it is at most a prohibition against recovery by the taxpayer. The unconstitutionality of Section 611 as thus construed is beyond dispute.

In order that there may be no confusion whatever, let us state that, for the sake of this argument under Heading III, we are conceding that the contentions made under Headings I and II, supra, will not meet the approval of the Court, and we are further assuming that if the Court finds a clear reimposition or ratification and legalization of the barred tax liability and of the act of the collector in collecting same, it will hold that the act is constitutional, contrary to our arguments under Heading IV, infra. With these concessions clear for the sake of the argument under this Heading, we proceed.

**(a). Further Construction of Section 611 if Construed to Bar Recovery by Suit.**

There are no words of legalization or ratification in Section 611, nor any which indicate that Congress recognized even the possibility that ratification might be necessary. The purpose of the section appears on its face to be *to prohibit refunds*. The section is stating how the payments mentioned shall be considered in the future for the purpose of credits and refunds, and is in effect prohibiting such credits and refunds. It is not legalizing and ratifying the act of the collector in collecting, and most assuredly it is not reimposing or recreating the barred tax liability. It is exempting payments described in Section 611 from the operation of Section 607 which provides for refunds.

Contrast the language used in Section 611 with that used in the statutes involved in the case of *United States v. Heinszen & Co.*, 206 U. S. 370 (1907), and in *Rafferty v. Smith, Bell & Company*, 257 U. S. 226 (1921), where nothing was left to the imagination of the court. The statute involved in the *Heinszen* case (Act of Cong. June 30, 1906, ch. 3912, 34 Stat. 636), provided:

> "That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eight, nineteen hundred and two,

at all ports and places in said islands, upon all goods, wares, and merchandise imported into said islands from the United States, or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eight, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed."

The language of the act in question in the case of *Rafferty v. Smith, Bell & Company*, supra, was substantially the same.

The Court in the course of its opinion in the *Heinszen* case, supra, remarked (at p. 382): "The text of the act of Congress is unambiguous and manifests as explicitly as can be done the purpose of Congress to ratify." The Court later on proceeds (at pp. 389, 390) to discuss the cases of *De Lima v. Bidwell*, 182 U. S. 1 (1901), and *Lincoln v. United States*, 202 U. S. 484 (1906). The Court considers that the ambiguity of the language was responsible for the decisions in both of the earlier cases, and in that way contrasts those cases with the *Heinszen* case.

Certainly, if Congress had felt that it was necessary to ratify and legalize action previously taken without any real authority whatever, it would have used clear and unambiguous language, from which there could be no escape, to the effect that such action was being ratified and legalized. It is respectfully submitted that the reimposition of a barred liability for taxes, where the right to sue for the wrongful collection of same had already accrued, would require more than ordinarily clear language. If a tax is not to be imposed by inference, as this Court has repeatedly held [*United States v. Merriam*, 263 U. S. 179 (1923); *Crooks v. Harrelson*, supra], certainly a liability for taxes in years long past, which had by statute been long since obliterated, cannot be reimposed nor the collection thereof ratified or legalized except by language more than ordinarily clear and unequivocal.

A consideration of the provisions of Section 611, with reference to taxes paid *"within one year after the passage of this act,"* shows conclusively that the section actually means what it seems on a casual examination to mean. Section 611 provides that when the conditions therein set forth exist

> "Then the payment of such part (made *before* or within *one year after* the passage of this act) shall not be considered an overpayment under the provisions of Section 607." (Italics ours).

The statute puts on the same basis taxes paid within one year after the passage of the Act and those paid before the passage of the Act. Therefore, if Section 611 reimposes any tax liability or ratifies any collection illegal at the time made, it has the same effect to ratify and legalize all taxes collected within one year after the Act as it has to ratify and legalize any taxes collected prior to the passage of the Act. But the Government concedes that it has no such effect as to taxes collected after the passage of the Act. On July 27, 1928, about two months after the passage of the Revenue Act of 1928, the Commissioner of Internal Revenue issued a ruling, Mim. 3660, VII-2 C. B., p. 82, to the effect that "Sections 607 and 611 do not authorize the Bureau *to enforce* collections of a tax *in any case* after the expiration of the period of limitation." The ruling went ahead to state that even voluntary payment should not be accepted from a taxpayer without notifying him of his right to withhold the payment.

It would be little short of absurd to attribute to Congress any intention to revive a liability for taxes which had not been paid and at the same time to provide no remedy whatever for the enforcement of that liability.

*As to future payments it seems that there is at most a prohibition only against refunds* and not any attempt to legalize or ratify any tax or the collection thereof. *Whatever is true with reference to future payments* we submit *is necessarily to be considered true with reference to past pay-*

*ments*, because there is absolutely no distinction in the statute between the two.

The constructions for which we have contended under Headings I and II above are clear without reference to committee reports, and we do not feel that the language used by Congress should be stretched beyond its natural meaning by reference to these reports, whatever they may say. Taxes are not to be imposed, and are certainly not to be retroactively modified or reimposed, on the basis of committee reports. If, however, the Court should turn to the committee reports for any purpose, it is respectfully submitted that they clearly show that, however far Congress may have gone in Section 611 in prohibiting recovery by the taxpayer, it sought to do so only by prohibiting the payment of the money back to him and not by legalizing or ratifying the payment as taxes or the action by which they were collected. The last report, that of the Managers for the House, stated to the House after conference (House Report No. 1882, p. 23, 70th Congress, 1st Session):

> "The Senate amendment struck out this section (the subsection of 611 proposing to give the right to collect by distraint or suit within one year after the passage of the 1928 Act) and the House recedes with an amendment retaining the *prohibition upon refunds*, as above described, and eliminating the authority for collection." (Italics ours).

It seems that the provision originally inserted authorizing collection by distraint within one year after the passage of the 1928 Act was stricken out because, as stated by Mr. Garner, ranking Democratic Member of the Ways and Means Committee, "there was some doubt about the constitutionality of it, and (we) decided to keep the $30,000.00 that we had in the Treasury." Cong. Rec., Vol. 69, p. 10136. This would seem to show conclusively that Congress had no idea of legalizing and ratifying collections previously made, but intended only to prohibit refunds; because, if Congress intended the Act to operate by ratification and legalization, it could have operated just as well in

connection with taxes yet to be collected, as in connection with those collected in the past. It seems clear that for some reason Congress had the idea that what the Government had it could keep, regardless of legality, whereas its power to authorize further collections was doubtful. The section in its original form, which provided for collection within one year after the passage of the Act, may have had a different purpose and effect. Language used with reference to the section in its original form may not be applicable to the section in its final form.

**(b) Unconstitutionality of Section 611 Construed as Barring Recovery by Suit but not Legalizing or Ratifying Collection.**

As stated above, the unconstitutionality of Section 611 is clear beyond question, if it is to be construed as simply barring recovery of amounts illegally collected without legalizing and ratifying the collection. The cases of *United States v. Heinszen* and *Rafferty v. Smith, Bell & Company*, supra, are no authority for any position to the contrary. Those cases go solely on the doctrine of ratification.

This Court has never held that where an exaction is made by a taxing officer of the Government, where no liability whatever for Federal taxes exists, the person from whom the illegal exaction is made can be deprived of his right of action against the individual so acting without some other proper remedy being left open to him.

In the case of *Cary v. Curtis*, 3 How. 236 (1845), it was held that an Act of Congress deprived the taxpayer of his right to sue the Collector of Customs for amounts illegally exacted as for money had and received, but it did not hold that taxpayer was deprived of all remedy or that he could be constitutionally deprived of all remedy. The Court said:

> "(The act) has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid." (at p. 242).

The court said further:

> "The claimant, moreover, was not without other modes of redress, had he chosen to adopt them. He might have asserted his right to the possession of the goods, or his exemption from the duties demanded, either by replevin, or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due." (at p. 250).

It is true that in one of the dissenting opinions it is pointed out that these remedies did not exist, but at least the Court in denying the right to sue the collector was assuming that the remedies did exist. And Mr. Justice Story and Mr. Justice McLean in their dissenting opinions both recognized the existence of an administrative remedy.

The case of *Collector v. Hubbard*, 12 Wall. 1 (1870) is authority for the proposition only that conditions such as the requirement of filing claim for refund can be imposed after a right to sue had vested.

It is also true, as held in *Cheatham v. United States*, 92 U. S. 85 (1875), that reasonable limitations of time and requirement of appeal from the Commissioner's decision prior to suit may be imposed upon the right to sue.

On the other hand, it has never been held by this Court, and we respectfully submit that it ought never to be held by this Court, that a taxpayer can be deprived of all remedy, judicial and administrative, in connection with illegal assessments and collections of taxes.

The attitude of this Court in matters of this sort is clearly shown by the opinion in the case of *Graham v. DuPont*, 262 U. S. 234 (May 21, 1923). The Court denied an injunction against collection and held that there was a full system of corrective justice provided after payment. No one can read that opinion and presume that the Court would have reached the same conclusion had there been no opportunity for a reasonable hearing after the collection of the tax. See also *Wickwire v. Reinecke*, 275 U. S. 101 (1927).

The Court will no doubt be referred to cases holding that the United States can withdraw the right to sue it. About that there can be no question. That rests on the immunity of a sovereign from suit. The same immunity does not extend to officers of the Government. See Laski, *"Responsibility of the State in England,"* 32 Harv. L. Rev. 447.

In this connection it may be well to note that even in the absence of statute the right to sue a collector for erroneous collection existed. *Elliott v. Swartwout,* 10 Pet. 137 (1856).

Even if it should be conceded that as to future collections Congress might have the power, without substituting any other remedy, to deny to the injured parties the right to sue collectors (such as has in the past arisen when any illegal collection has been made), that concession still would not go far enough to support the contention that Congress may take away the right to sue a collector which arose under a valid statute in force when the wrong was committed. That right is a vested right like any other right of action vested in one individual against another, and the fact, if it should be conceded to be a fact, that Congress might in the first instance have made the officer immune from suit on account of his wrong, would not authorize the destruction of the right of action after it has vested. The *Heinszen and Rafferty* cases are, as stated above, no authority for any such proposition, because in those cases there was no taking away of a right to sue for any wrong committed, but the creation of a right where there had previously been a wrong, which creation Congress had a right to make under the circumstances. The right of action vested subject to the power of the United States to ratify, and the right of action is destroyed as a mere incident of the ratification.

The right to sue a sovereign can, of course, be taken away after it has vested. That is a necessary incident of sovereignty, and is perhaps superior to all constitutional limi-

tations. But the right to sue an officer for an illegal act done in the name of the Government rests upon an entirely different basis.

Therefore, if Section 611 is construed as simply barring recovery and not as legalizing and ratifying the collection of the taxes or legalizing, ratifying and reimposing the barred liability, there is no possibility of this Court holding that it was within the constitutional power of Congress to enact it.

**(c) Section 611 does not Withdraw the Consent of the United States to be Sued if Right to Sue Collector Remains.**

We do not question the power or right of the United States to withdraw its consent to be sued if it wishes to do so. On the other hand, if the United States cannot abolish the taxpayer's right to sue the collector without placing some other remedy in its place, there is not the slightest reason for supposing that Congress intended to withdraw the right to sue the United States. If remedy by suit against the collector entitling the taxpayer to a jury trial is left undisturbed, certainly Congress could not have intended to withdraw the right to sue the United States given by Section 145 of the Judicial Code (28 U. S. C., sec. 250) and Section 3226 of the Revised Statutes. The provisions of Section 611 cannot fairly be construed as being separable to this extent.

## IV.

## EVEN IF SECTION 611 BE INTERPRETED AS ATTEMPTING TO LEGALIZE AND RATIFY THE ACTION OF THE COLLECTOR IN COLLECTING THE TAXES AND/OR TO REIMPOSE OR LEGALIZE THE TAXES THUS COLLECTED, IT IS UNCONSTITUTIONAL

It has been argued under Heading III above that as a matter of statutory construction Section 611 cannot be held to

provide for the legalization and ratification of collection, but that at most it only bars the right to sue for the recovery of sums illegally collected. Assuming, however, that Section 611 should be construed as attempting specifically to legalize and ratify collections after the statute, and/or to reimpose or legalize the taxes thus collected, the section would nevertheless be unconstitutional and void under the Fifth Amendment in that it would be discriminatory, arbitrary, whimsical, capricious and unjust.

There is now no doubt that taxing acts of Congress may be held void under the Fifth Amendment.

*Nichols v. Coolidge*, 274 U. S. 531 (1927);

*Blodgett v. Holden*, 275 U. S. 142 (1927);

*Untermyer v. Anderson*, 276 U. S. 440 (1928);

*Amberg, "Retroactive Excise Taxation,"* 37 Harv. L. Rev. 691.

**(a) Section 611 is Much too Unreasonably Retroactive to be Valid as an Imposition of Taxes de novo.**

It is not anticipated that the Government will seriously contend that Congress could in 1928 impose *de novo* taxes for 1917 or 1909. The court has specifically held that the retroactive gift taxes and estate taxes involved in the cases just cited are unconstitutional. While income tax acts have been upheld which are retroactive to the first of the year, or in a few cases where they have been passed after the end of a calendar year and are retroactive to the beginning of that year, no attempt has ever been made to enact legislation of this character and make it retroactive for several years past, and it is not thought that this Court would for a moment entertain the thought that such legislation would be constitutional. For collection of statutes, see footnote by Mr. Justice Brandeis, dissenting opinion *Untermyer v. Anderson*, supra, which is copied as "Appendix 2" to this brief, page 56.

It will be noted that *Section* 611 *applies not only to income taxes, but to all internal revenue taxes.* It applies to estate taxes, to capital stock taxes, sales taxes and all the other various excise taxes imposed by the various Revenue Acts from 1916 through 1921. It applies as well to taxes under the Corporation Excise Tax Act of 1909 (Act of Aug. 5, 1909, Ch. 6, Sec. 38, 36 Stat. 112) and under the Income Tax Act of 1913 (Act of October 3, 1913, 38 Stat. 114, 166, 172) as to taxes under the Revenue Act of 1921 and the preceding acts. Under Section 250(d) of the Revenue Act of 1921 liability for the tax of 1909 ceased to exist in 1915. [Sec. 1320 of the Revenue Act of 1921 provided a limitation on assessments and collection of *any internal revenue tax* not covered by Sec. 250(d)]. Yet if by any chance taxes in that year were not paid but were assessed within time, and there was any delay in collection caused by the filing of a claim in abatement, a collection by distraint, even in April, 1928, would be legal if Section 611 is construed as contemplated by this Heading and held constitutional.

In the case at bar collection was made of a 1917 tax in October, 1923, more than six months after the liability had ceased. Section 611 would be equally applicable, however, if the collection had been made on May 15, 1928, more than five years after the liability had ceased.

It is just as unlikely that the Government will contend that at the time the collections covered by Section 611 were made Congress could have imposed *de novo* the taxes thus collected as it is that it will contend that Congress could have imposed the taxes *de novo* when the 1928 Act was passed on May 25, 1928. It is true that some of the collections covered by Section 611 may have been made only a few days after the statute of limitations had run, but others were made as much as four or five, and some possibly as much as ten years, after the statute of limitations had extinguished the liability, and there is no basis laid down in Section 611 for distinguishing between taxes collected within a few days after the expiration of the statute and those

made several years afterward. And if the statute is constitutional as to those made several years after the statute of limitations had expired, it will undoubtedly be held constitutional as to all.

**(b) The Doctrine of the Heinszen and Rafferty Cases does not Sustain Section 611.**

If the Government contends that there was an attempt to legalize and ratify the action of the collector it will contend that it is not necessary to show that Congress could have imposed a tax *de novo* and will no doubt rely on the case of *United States v. Heinszen*, supra, and *Rafferty v. Smith, Bell & Company*, supra, which cases when properly analyzed have no bearing upon the issues involved in this case. These cases have been referred to above under Heading III, where it is shown that they cannot apply in any situation where there is no attempt at ratification. It will be shown below that these cases equally fail to sustain the Government's position, even if Section 611 be construed as attempting to legalize and ratify collections made. The *Heinszen* case and the *Rafferty* case are the same in principle, and we shall therefore refer only to the facts of the *Heinszen* case where the reasoning upon which the ratifying act was upheld was more fully developed.

(1) *The Doctrine of Ratification Established in the Heinszen Case is Inapplicable Unless Power to Authorize Existed When Collection was made.*

In the *Heinszen* case there was involved the question of the power of Congress in 1906 to ratify the collection of tariff duties in the Philippine Islands which a Presidential order had imposed, or attempted to impose, after all authority in the executive to make such imposition had ceased and the islands had come under the control of Congress. The collections sought to be ratified were made from 1899 to March 8, 1902, and the ratifying act was not enacted until 1906.

The ratifying act was upheld on the principle of ratification in the law of agency, the Court holding that since Congress could have authorized the collection of the duties if action had been taken at the time the duties were being collected (which it is to be presumed was coincident with the introduction of the imports into the islands), it could, when the collection has been illegally made, ratify the acts done on its behalf by its agents who were previously acting beyond their authority. In other words, the fundamental premise upon which the Court rested its conclusion in that case was that the unauthorized action could have been authorized by Congress at the very time when it was being taken. The Court said (p. 386):

> "The (ratifying) act is but an exercise of the conceded power dependent upon the law of agency to ratify an act done on behalf of the United States which the United States could have originally authorized."

There was no doubt of the power of Congress in the situation there presented to have imposed the duty *de novo* if Congress had acted at the very time when the collection was being made. That power was so clear that the Court simply assumed it without discussion.

Here the question is entirely different. As we have attempted to show under the discussion of "Unreasonable Retroactivity" under (a) above, it is not to be presumed that this court would hold that in the cases covered by Section 611 the taxes could have been legalized or reimposed or that authority to collect same could have been given originally at the time when the collections were being made.

If the Court should hold that such authority could have been given by the action of Congress taken at the time when the collections were being made, then we would readily admit that the *Heinszen* case is authority for the proposition that that collection could be later ratified, and the *Heinszen* case would then sustain the constitutionality of Section 611, except for its unreasonably discriminatory and arbitrary provisions which are discussed below and which we con-

tend would make the section unconstitutional without regard to its unreasonably retroactive effect. But if the Court holds that Congress did not have power to authorize the collections at the time when they were being made, then the *Heinszen* case is no authority whatever in support of the constitutionality of the subsequent ratification by Section 611. The *Heinszen* case does not even touch upon the issues which must determine whether Congress had authority to authorize the collections covered by Section 611 if it had acted at the time the collections were being made, and of course it in no way touches upon the constitutionality of arbitrary and discriminatory provisions such as are contained in Section 611.

(2) *Section* 611 *is Invalid under the Doctrine of the Heinszen Case because the Attempted Ratification Followed Effective Repudiation.*

There is another very clear distinction which makes the doctrine of the *Heinszen* case inapplicable to cases covered by Section 611; that is, the *principle of repudiation* in the law of agency. This Court should hold, as was held by the Supreme Judicial Court of Massachusetts in the case of *Holden v. Metropolitan National Bank,* 151 Mass. 112 (1890), the opinion in which was written by Mr. Justice Holmes, that where one purports to act as agent for another without authority and the unauthorized acts are made known to the principal and the principal repudiates such acts, the principal is not in a position subsequently to ratify those acts. Congress should not therefore be permitted to ratify collections which it has previously repudiated.

There was effective repudiation of the collections here involved. Large numbers of unauthorized collections after the statute of limitations had expired were made in 1923, 1924 and 1925. This was called to the attention of Congress. The Court of Claims had held that such amounts could not be recovered from the Government, *Toxaway Mills v. United States,* supra, holding in effect that the statute operated to

bar the remedy but did not extinguish the right of the Government to collect. When this situation was called to the attention of Congress its answer in Section 1106(a) of the Revenue Act of 1926 was a repudiation of the action of the collectors in collecting after the expiration of the statute of limitations. Section 1106(a) of the Revenue Act of 1926 provides:

> "The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy, but shall extinguish the liability . . . "

The legislative history of this section is discussed in other briefs and is referred to elsewhere in this brief. It shows clearly that Section 1106(a) was enacted expressly to avoid the injustice of the *Toxaway Mills* decision.

The attempt of a later Congress to take advantage of these unauthorized and illegal acts on the part of collectors can have no effect. The intervening repudiation should clearly be held to preclude subsequent ratification.

(3) *Congress must have had Power to Authorize at the Time of Ratification.*

Not only is it necessary that Congress should have had power at the time of the acts of the collectors to authorize such acts, but it is also necessary, for the application of the doctrine of ratification, that Congress at the time of the ratifying statute should have power to give authority for the acts in question.

*Forbes Pioneer Boat Line v. Commissioners*, 258 U. S. 338 (1922);

*Bird et al., Assignees of Carne & Telo v. Brown et al.*, 4 Exch. 786 (1850);

*Marsh v. Fulton County*, 10 Wall. 676 (1870);

*Mechem, "Agency"* (2d ed. 1914) Sec. 385.

Under these authorities it is clear that regardless of whether or not Section 611 amounted to an imposition *de novo* of internal revenue taxes on account of transactions or activities occurring as far back as 1909 or before, a test of the power of Congress in 1928 to ratify the collections in question is to be found in the power of Congress in 1928 to make such an imposition *de novo*. While this test was rejected by Mr. Justice White in the *Heinszen* case, it does not appear that it had been called to his attention that the law of agency contains a well recognized restriction upon the doctrine of ratification, and requires as a condition of ratification, the power and ability on the part of the principal effectively to authorize the acts of the purported agent at the time of the attempted ratification. If this principle had been called to his attention, it does not appear that the same result would have been reached.

(4). *The Limitations upon Curative Legislation in General Restrict the Power of Ratification.*

The Court in the *Heinszen* case recognized as limitations upon the power of ratification the limitations which apply generally to curative acts. The Court does not there lay down any formula by which the extent of the authority to enact curative legislation, retroactive in character, may be determined. On the other hand, the opinion does clearly show that it recognizes such limitations, though it considered that the *Heinszen* case came within principles permitting the enactment of curative legislation.

The Court seemed to place great reliance upon the fact that there was a tariff in existence when the goods were brought into the islands, and that it was illegal only because the proper legal authority had not been delegated by Congress to the President. The Court takes pains to show that not only could Congress have enacted the tariff itself but also that it could have delegated that authority to the President, and that the President under that authority

could have issued the same order which he issued. These facts afford the basis upon which it was held that the action in question in the *Heinszen* case comes within the permitted category. The Court would undoubtedly have reached a different conclusion in the *Heinszen* case if there had been any attempt to impose a tariff which was not in existence de facto at the time when the goods came into the islands.

Perhaps the best statement of the considerations which weigh with the court in determining whether legislation of a curative character may be constitutional in spite of its retroactivity is to be found in the opinion of Mr. Justice Holmes, when he was Chief Justice of Massachusetts, in the case of *Danforth v. Groton Water Co.*, 178 Mass. 472 (1901), where there was involved an act extending the time within which persons might file petitions for damages where water rights had been appropriated by the defendant company. The act was not passed until the year allowed by the original act for filing the petition had expired. Mr. Justice Holmes there stated:

> "Nevertheless in this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some *slight technical defect* on absolutely the same footing as those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. *Camfield v. United States*, 167 U. S. 518, 523, 524. But, however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.

"In some such cases there has been at an earlier time an enforceable obligation, in others there never has been one, but in both classes the courts have laid hold of a distinction between the remedy and the substantive right, or have said that 'a party has no vested right in a defense based upon an informality not affecting his substantial equities', *Cooley, Const. Lim.* (6th Ed.) 454; or that 'there is no such thing as a vested right to do wrong,' *Foster v. Essex Bank*, 16 Mass. 245, 273; or have called it curing an irregularity, *Thomson v. Lee Co.*, 3 Wall. 327, 331, *Lane v. Nelson*, 79 Penn. St. 407, *Kreiger v. Randall*, 23 Wall. 137, or have dwelt upon the equities, meaning the moral worth of the claim that was preserved, or by one device or another have prevented a written Constitution from interfering with the power to make *small repairs* which a Legislature naturally would possess." (Italics ours).

The question was again presented to the Supreme Judicial Court of Massachusetts in the case of *Dunbar v. Boston & P. R. Corporation*, 181 Mass. 383 (1902). In this latter case the court stressed the very short time which elapsed between the expiration of the original statute and the passage of the remedial statute.

See also *Forbes Pioneer Boat Line v. Commissioners*, supra.

It is clear that the fact that the defect is only technical, or that only a short time has elapsed as between the expiration of the statute of limitations and the passage of the curative act, or that there is only some irregularity in legal proceedings, or that color of authority existed for what was done, and above all that substantial justice is furthered, are all elements which weigh very strongly in determining whether a curative act shall be held constitutional in spite of its retroactive effect. See the following authorities cited by Mr. Justice White in the *Heinszen* case at the pages referred to by him and at other pages.

*Kent, Commentaries*, Vol. 2, pages 415, 416 (Vol. 1, star pages 455, 456);

*Cooley, Constitutional Limitations* (7th Ed. 1903) pp. 528, 530, 543; (8th Ed. 1927) pp. 771, 773, 787.

The failure of Section 611 to comply with any of the conditions upon which curative legislation may be sustained is apparent. The only argument which might be made in support of sustaining it as curative legislation is that the right of Petitioner to recover rested only upon the statute of limitations and that that was merely a technical defense, and that substantial justice is promoted by abolishing the defense. This argument is best answered by Mr. Justice Holmes in the case of *Dunbar v. Boston & P. R. Corporation*, supra, where he said:

> "It cannot be said in more general terms that a statute of limitations as such embodies an arbitrary or merely technical rule. Prescription and limitation are based on one of the deepest principles of human nature, the working of association with what one actually enjoys for a long time, whatever one's defects of title may be, and of dissociation from that of which one is deprived, whatever may be one's rights. The mind like any other organism gradually shapes itself to what surrounds it, and resents disturbance in the form which its life has assumed. In cases like the present when the period of limitations is short no doubt other but also important elements are predominant,—the desirableness for business reasons of getting a quasi public transaction finished,—but whatever the details, the principle involved is as worthy of respect as any known to the law." (at p. 385).

In the present case there was not a short statute of limitations. The Government had five years from the filing of the return. There was no color of authority for collection; the statute of limitations clearly barred all right to collect. We maintain further that the right as well as the remedy was barred and that all liability for the tax was destroyed as effectively as if it never existed. These matters were called to the attention of Congress in 1926, and Congress repudiated all these collections. The doctrine of repudiation by the Legislature should certainly have a place in the doctrine of curative legislation and no curative act should be permitted after there has been repudiation.

Keeping before us the requirement indicated by the authorities just referred to, that curative legislation must work substantial justice, we should not overlook the fact that *Section* 611 *may apply to a collection made in* 1928 *on account of transactions and activities which produced income in* 1917 *or even in* 1909, *and applies to excise taxes as well as to income taxes.* Meanwhile all sorts of rights of third parties have intervened. Corporate stock and businesses might have been bought by purchasers who have relied upon the statutes and the decisions of this Court in concluding that certain excessive tax claims have been outlawed. A purchaser under such circumstances in the first part of 1928 might find that a collection which is later made, prior to the passage of the 1928 Act, is legalized by that Act. Original taxpayers, as well as the purchasers or transferees of their business, might have destroyed their books of accounts and records of ten, or perhaps almost twenty, years standing in reliance upon the statute and the decisions of this Court which would protect them from the stale demands of the Government for taxes. The burdens of Section 611 would fall as well upon taxpayers having a valid and meritorious defense to the tax claims of the Government, but who, relying upon the statutes and decisions, have not preserved the evidence necessary to support the merits of their cases. The statutes which the Government has held out as statutes of repose would thus be used as traps to ensnare such taxpayers.

We discuss below the unreasonably discriminatory, arbitrary and capricious character of the section which, far from working substantial justice, accomplishes the reverse.

**(c) Section 611, apart from its Retroactivity is Unreasonably Discriminatory, Arbitrary and Capricious and Therefore in Violation of the Fifth Amendment.**

We have discussed above, page 33, the power of Congress to impose *de novo* income and excise taxes in connection

with years and transactions long past. We do not believe this Court will uphold such impositions. But whether such taxes can be imposed *de novo* or whether collections previously made can in general be ratified, it is clear that any legislation in order to be constitutional must not be unreasonably discriminatory, arbitrary, capricious or whimsical, and we respectfully submit that this rule should apply with particular force to curative legislation which is impressed at the start with the unfairness of retroactivity, which unfairness may be overcome, if at all, only where such legislation accomplishes substantial justice. When subjected to this test, Section 611 is clearly seen to be in violation of the Fifth Amendment and void.

We shall undertake here to make a brief summary of some of the discriminatory and arbitrary features of the Section apart from its retroactivity. Others can no doubt be pointed out by persons more familiar with certain features of the administration of tax laws than are we. We therefore respectfully request your attention to all of the various briefs filed dealing with this subject.

(1) COLLECTION DELAYED ON ORAL APPLICATION. Section 611 makes the reimposition of the tax dependent upon whether a claim in abatement was filed within the statutory period. The filing of a claim in abatement had absolutely no legal effect. This the Government will admit. *See Article 1032 of Regulations 45.* The filing of a claim in abatement was no more effective legally to hold up the collection of a tax than was an oral request to the collector. *Many collectors did actually hold up for years the collection of taxes without the filing of any claim in abatement, upon the oral request* of persons whom they felt to be financially responsible, when good reason existed for not collecting the tax in the ordinary course. The presence or absence of a written claim in abatement was absolutely immaterial from any moral or legal standpoint. *The erroneous impression under which the Commissioner of Internal Revenue was laboring*

*in delaying collection was not the result of the filing of the claim in abatement. The Commissioner thought that in any case he had an unlimited time within which to collect by distraint when assessment was made within time.* The two cases are exactly on a par, and yet Section 611 covers one case and not the other, although all of the facts from a moral and legal standpoint are the same.

(2) COLLECTION DELAYED BY INABILITY TO FIND PROPERTY. In many cases collectors held up collection in the absence of claims in abatement, for the reason that no property of the taxpayers could be found on which to levy distraint. Certainly Section 611 is arbitrary and unjust in discriminating in favor of such taxpayers and against those who filed written claims in abatement to get a hearing on tax claims which they disputed. (See (6) page 48, infra).

(3) COLLECTION DELAYED BY CLAIM FOR CREDIT. Section 611 does not cover the situation where collection was held up beyond the statutory period as a result of the filing of a claim for credit. Claims for credit were provided for in *Articles* 1034 *and* 1035 *of Regulations* 45. Where a taxpayer claimed that he had overpaid his tax for one year he was allowed to file a claim for credit, asking that the overpayment be applied as a credit against an assessment of taxes which he admitted to be valid for another year. He was thus in a position to delay the collection of the assessment which he admitted to be valid. If this delay continued until after the expiration of the statute of limitations on the unpaid assessment, the taxpayer acquired a defense to the collection of such assessment. If a collection was made under such assessment after the expiration of the statute of limitations, whether the collection was by direct payment or by credit, the taxpayer is entitled under the provisions of the Revenue Act of 1928 to recover such sums. See Sections 607 and 609 of the Revenue Act of 1928. *G. C. M.* 6296, *VIII-2 Cumulative Bulletin* 152. It is not possible to

suggest a rational basis for distinguishing between a taxpayer in the circumstances just described, and one who succeeded in holding up collection of his tax by the filing of a claim in abatement rather than a claim for credit. And yet Section 611 of the Revenue Act of 1928 attempts to discriminate against one of these taxpayers in favor of the other. The claim for credit had just as much legal effect as a claim in abatement, and it operated just as fully, if not more so, in ordinary circumstances to have the collector hold up collection of a tax.

If there is any difference at all between the credit case and the abatement case the morals in favor of the taxpayer are stronger in the abatement case because where the claim for credit was filed it was generally admitted that the tax sought to be collected was actually due.

(4) TAXES PAID AND RECOVERED BEFORE 1928 ACT. Section 611 does not authorize collection to be made from those who delayed collections by claims in abatement, but who, prior to the Revenue Act of 1928, paid the tax and had recovered by administrative refunds or by suits taxes illegally collected after the statutory period therefor. See (5) below.

(5) ASSESSMENTS UNCOLLECTED WHEN 1928 ACT PASSED. Section 611 does not authorize collection to be made from those who delayed collections by claims in abatement until after the passage of the Revenue Act of 1928. The Bureau admits that Section 611 gives it no right to enforce collection after the Revenue Act of 1928. *Mimeograph* 3660, *VII-2 Cumulative Bulletin* 82. In the first draft of the Revenue Bill of 1928, Section 611 contained the following subsection:

> "(b) A distraint or proceeding in court for the collection of such part may be begun within one year after the enactment of this act."

The purpose of this provision was explained in the report of the House Ways and Means Committee in the following language:

> "*In order to prevent inequality*, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new act." House Report No. 2, page 34, 70th Congress, 1st Session.

The above provision which was inserted in the original bill "in order to prevent inequality" was stricken and the bill as it was enacted did not contain this provision. *House Report No.* 1882, *pages* 6, 22, 23, 70*th Congress*, 1*st Session.*

The Amendment referred to, instead of avoiding unconstitutionality, has tainted Section 611 with that inequality and unfair discrimination which the House sought to avoid by subsection (b) of the original draft of the section. Those taxpayers against whom the collectors happened to make their illegal demands, and who in response thereto had paid the taxes thus demanded prior to the enactment of the Revenue Act of 1928, are made to bear the burden of Section 611. But those taxpayers who were otherwise in identically the same situation, but upon whom the collectors did not happen to make the illegal demand, or who, by some contrivance or other, avoided compliance with the collector's demand for the payment of taxes until after the passage of the Revenue Act of 1928, are placed in a position of special favor and exemption. This discrimination was not wanted by the House, but the House swallowed the section in its amended form rather than lose the section in its entirety. It is submitted that this discrimination, the result of compromise, is so arbitrary and unreasonable that it renders the section unconstitutional.

The answer will probably be made to this argument which was made by the court in *Reeves v. Anderson*, supra, that in drafting statutes of limitations it is necessary to draw the line somewhere, and Congress felt that it should be

drawn at May 29, 1928. That would undoubtedly be sound as to statutes passed a reasonable time before May 29, 1928. Congress could make May 29, 1928, the date of the expiration of the statute. But when Congress attempts to legalize what has previously been illegal, and draws the line at the date of the enactment of the legalizing act so that it is by legislative prohibition impossible for the administrative officers of the Government to enforce the Act equally against those who were previously on a basis of equality, entirely different considerations are involved.

(6) DELAY CAUSED BY TAXPAYER DEMANDING HEARING BEFORE ASSESSMENT. Insofar as the provisions of Section 611 are concerned, there is no valid basis for distinguishing between the situation where assessments were not made until after a hearing, as provided under Section 250(d) of the Revenue Act of 1921, and the situation where the Commissioner made an assessment on account of a proposed deficiency, and the taxpayer filed a claim in abatement and had a hearing thereon. The statute of limitations on collection was five years in either case. In each case the taxpayer was in a sense delaying the collection by the Government of the amounts indicated to be due by the Government's preliminary investigation of which the taxpayer had been notified. The only difference was that the taxpayer who was granted the right to a hearing before the assessment was made would not have to pay any interest on any amount finally found to be due for any years prior to 1921, whereas when the assessment was made without giving him a hearing and he was required to file a claim in abatement interest ran immediately on whatever amount was found to be due. Compare Sections 250(b) and 250(e) of the Revenue Acts of 1918 and 1921. See also *Holmes, Federal Income Tax* (6th Ed. 1925) 1370.

In the latter case (where tax assessed and claim in abatement filed) the taxpayer also had the additional disadvantage of having an outstanding assessment against him and

having to depend upon the discretion of the collector as to whether he would collect.

If there is any difference between the two situations described above, it certainly does not furnish any basis for discrimination against the taxpayer who was not given the benefit of a hearing before assessment. If any distinction at all should be made we would have thought that the distinction should be in favor of the person who was required to file the claim in abatement against an assessment imposed upon him without reasonable opportunity for hearing. Yet Section 611 discriminates against him.

(7) SECTION 611 SEEMS TO DISTINGUISH BETWEEN PAYMENTS BY CREDIT AND OTHER PAYMENTS. Section 611 qualifies Section 607, but does not seem to qualify Section 609 (a) of the Revenue Act of 1928. Section 609 (a) declares invalid a credit against an alleged deficiency in tax which is barred by the statute of limitations. Insofar as Section 611 is concerned, there is no basis for a valid distinction between collection by distraint or by direct payment on the one hand, and collection by credit, whether at the request of the taxpayer or by the application of the Commissioner against the will of the taxpayer.

(8) DELAY ON BASIS OF DEFECTIVE WAIVERS. In many cases taxpayers delayed collection of taxes beyond the statutory period by filing waivers, which, in many instances, were defective. The defect in the waivers in many cases was due to a mistake of law on the part of the Commissioner of Internal Revenue as to the sort of waiver which would be effective and what acts on his part were necessary to make the waiver effective. Cf. *Charles H. Stange v. The United States*, United States Supreme Court, October Term, 1930, No. 23. Section 611 does not attempt to cover any such cases.

(9) CONCLUSION AS TO ARBITRARINESS AND DISCRIMINATION. Where assessments had been made "within the period of limitation properly applicable thereto," the Bureau of Internal Revenue mistakenly assumed that there was no limitation on the time within which it could enforce collection by distraint, and the Department Officials thus neglected to take proper steps for timely collection. The Bureau of Internal Revenue has, by procuring the enactment of Section 611, attempted to relieve itself of some of the damage caused by its mistaken view of the law. *But Section* 611 *fails to cover all cases where damage resulted from this same mistake of law. There was no mistake of law based upon the effect of a claim in abatement. The error was with reference to the effect of an assessment and not a claim in abatement. And the taxpayer no more induced the delay where a claim in abatement was filed than in any of the other cases where the Commissioner failed to act while protests of taxpayers were being heard or any other claims of taxpayers were being considered.*

It is undoubtedly true that Congress may make discriminations in taxation which are not geographical in their character. The Fifth Amendment does not prevent reasonable classification, but Congress most assuredly could not tax all red-headed people and provide that all black-headed people should go free. We may assume for the sake of argument that Congress can pass a statute providing that all persons during the last ten years who have escaped taxation on account of the running of the statute of limitations may now be taxed for the amounts they should have paid, or Congress might perhaps go further and provide that all persons who were notified within said period of the fact that a tax of so much was proposed against them would be subject to that tax, regardless of the period of limitations. But Congress certainly cannot provide that of those persons who have escaped taxation and who have been notified within the period of limitations of the proposed tax against

them, only those persons shall be taxed who filed a paper which had no legal or moral effect and in no way distinguished them from other taxpayers who were requesting additional time or further hearings before collection was enforced against them.

## CONCLUSION

Section 611 should not be construed to have any effect upon taxpayer's right to recover by suit a tax erroneously or illegally assessed or collected, because collected after the statute of limitations had barred collection. It is clear that the provision that a payment covered by Section 611 "shall not be considered as an overpayment" does not prevent the payment from being a tax "illegally or erroneously assessed or collected." It is apparent from the use of "overpayment" and "taxes erroneously or illegally assessed or collected" elsewhere in the Revenue Acts that the terms are not synonymous, and it is further clear that "credit or refund" in the Revenue Acts refers generally to administrative action, and that when it is intended to prohibit suit for the recovery of taxes "erroneously or illegally assessed or collected" Congress has expressly prohibited suit and has not stopped with prohibiting "credit or refund."

"Stayed" should not be construed as synonymous with "delayed" and Section 611 should not be held to apply where collection was not actually stayed.

If Section 611 should be interpreted as barring recovery by suit as well as by administrative refund, it attempts only to take away the right of recovery without legalizing the collection. Upon this construction it is clearly unconstitutional because it takes away a right of action for an admitted wrong which is left undisturbed. Congress has no such power. While it could take away the right to sue the United States it cannot take away the right to sue the collector without substituting some other remedy.

Even if Section 611 attempts to legalize and ratify previously illegal collections or to ratify or reimpose a tax, the liability for which had become barred, it is unreasonably retroactive and would have been so even if enacted at the time when the collections were being made. And entirely aside from the evil of retroactivity it is unconstitutional, because it is so grossly discriminatory and capricious in seeking to bar recovery of taxes where a claim in abatement was filed and collection delayed, while omitting similar provisions for cases where delays of exactly the same character were equally brought about by taxpayers in other form requesting hearings and reconsideration before and after assessment.

Respectfully submitted,

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## APPENDIX 1.

## THE EXPIRATION OF THE STATUTORY PERIOD OF LIMITATION ON COLLECTION OF INTERNAL REVENUE TAXES NOT ONLY BARS THE REMEDY OF COLLECTION BUT ALSO EXTINGUISHES ALL LIABILITY FOR THE TAXES. EFFECT ON MAIN ARGUMENT OF CONTRARY HOLDING.

The argument that the expiration of the statute of limitations provided in the Revenue Act extinguishes the liability and does not simply bar the remedy has been developed at length in a number of other briefs filed in the case of *Graham & Foster v. Goodcell*, No. 36, and companion cases. See the main brief for Petitioners in No. 36 at pages 53 to 59. We would only add a word here in support of that proposition.

It is true that common law rights, such as rights in contract and tort generally, are held to continue after the expiration of periods provided in general statutes of limitation. However this doctrine of the survival of the right after the extinguishment of the remedy does not apply even at common law to cases where adverse possession is held for the statutory period. This possession ripens into right.

The existence of a right without a remedy, while possible, presents an anomalous situation, and this Court has very clearly shown a tendency to restrict this anomaly within the smallest limits possible; and, as said in the case of *Davis v. Mills*, 194 U. S. 450, 454 (1904) a statute will be construed as limiting the *right* and not simply the *remedy* wherever it is possible to give it this construction.

The general rule that all provisions of taxing acts, including even limitations provisions, are to be construed most strongly in favor of the taxpayer, should also lead this Court to construe the limitations provisions of a taxing act as extinguishing the right and not simply the remedy, because certainly that is the construction most favorable to the taxpayer.

We are confident that the Court will hold that Section 250(d) of the Revenue Act of 1921 (and also Section 1320 of the same Act) extinguished the liability for the tax. Under Headings III and IV of our Argument we have made this assumption. However, if this Court should hold to the contrary, we do not think that this contrary holding would seriously affect the validity of the constitutional objections to Section 611 which we have raised under Headings III and IV.

The constitutional argument under Heading III (under which Heading it is assumed for the consideration of the constitutionality of Section 611 that it is to be construed as attempting to deprive taxpayer of his right of action without legalizing the wrong upon which the right of action is based) is very little, if at all, weakened, if it is held that the statute of limitations in the Revenue Acts barred the remedy only and did not extinguish the liability. Even if the remedy only was barred, still, the collection was clearly illegal when made, and the effect of Section 611, as construed under that Heading, is not the same as removing the bar of the statute of limitations as was done in the case of *Campbell v. Holt*, 115 U. S. 620 (1885). The statute in that case authorized, and made fully legal, the future collection by suit by lifting the bar of the statute which had already fallen. Section 611, if construed as we have assumed under Heading III, does not go far enough to remove the bar of the statute of limitations and make the collection legal, but simply bars recovery back of taxes illegally collected and for the recovery of which a right of action had vested, leaving the collection illegal.

All of the arguments as to the unreasonably discriminatory character of Section 611 which are made under Heading IV would apply with equal force whether the statute of limitations barred the right or only the remedy. We believe too that at the present time the Court, if it were called upon to do so, would sufficiently qualify or disregard the

doctrine of *Campbell v. Holt*, as suggested by Mr. Justice Holmes in *Danforth v. Groton Water Company*, supra, to make it inapplicable to a case where, as here, Congress goes back so far into the past to raise the bar of the statute of limitations on a statutory liability where that bar had fallen. It will be recalled that Mr. Justice Bradley wrote a strong dissenting opinion in *Campbell v. Holt*, in which dissent Mr. Justice Harlan concurred.

## APPENDIX 2

*Footnote* 1, *Dissenting Opinion of Mr. Justice Brandeis, Untermyer v. Anderson*, 276 U. S. 440 (1928):

"The Act of August 5, 1861, chap. 45, 12 Stat. at L. 292, 309, applied to all incomes for the calendar year next preceding January 1, 1862. The Act of July 1, 1862, chap. 119, 12 Stat. at L. 432, 478, enacted higher rates, applicable to incomes for the year ending December 31, 1862. The Joint Resolution of July 4, 1864, No. 77, 13 Stat. at L. 417, imposed an additional tax of 5 per cent on incomes for 1863 which had already been taxed at the rates established by the Act of 1862. The Act of June 30, 1864, chap. 173, 13 Stat. at L. 223, 281, applied to incomes for the then current calendar year. The Act of March 3, 1865, chap. 78, 13 Stat. at L. 469, 479, which again raised the rates, applied to income for the year ending December 31, 1865. The Act of March 2, 1867, chap. 169, 14 Stat. at L. 471, 477, also applied to income for the current calendar year. The Act of July 14, 1870, chap. 255, 16 Stat. at L. 256, 257, taxed incomes for the year commencing January 1, 1870, though the Act of June 30, 1864, chap. 173, 13 Stat. at L. 223, 283, of July 13, 1866, chap. 184, 14 Stat. at L. 98, 138, and of March 2, 1867, chap. 169, 14 Stat. at L. 471, 480, had provided that income arising after January 1, 1870, was to be free from tax. The Act of August 27, 1894, chap. 349, 28 Stat. at L. 509, 553, applied to incomes in the calendar year ending December 31, 1894. The Act of October 3, 1913, chap. 16, 38 Stat. at L. 114, 166, applied to incomes received subsequent to March 1, 1913. The Act of September 8, 1916, chap. 463, 39 Stat. at L. 756, applied to all income of that year. The increased rates established by the Act of October 3, 1917, chap. 63, 40 Stat. at L. 300, applied to incomes received during the calendar year commencing January 1, 1917. The Revenue Act of 1918, February 24, 1919, chap. 18, 40 Stat. at L. 1057, 1058, applied to incomes for the year 1918. Later Revenue Acts have been similarly retroactive with respect to the income tax: Act of November 23, 1921, chap. 136, 42 Stat. at L. 227; Act of June 2, 1924, chap. 234, 43 Stat. at L. 253, 254; Act of February 26, 1926, chap. 27, 44 Stat. at L. 9, 10 U. S. C., title 26, Section 1272."